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CONSTITUTIONAL AMENDMENT IN VIRGINIA.

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When laboring through the course of Constitutional and International Law at the University of Virginia, in the days that I am still privileged to call *comparatively recent*, I absorbed a wholesome respect for a constitution as an instrument of permanency and stability not to be lightly altered or amended, and as a brief document dealing with the essentials of government only. In still more recent years, however, the attitude of the public, if not the professional, mind has undergone a marked change. The up-to-date constitution would seem to be a book of quasi legislative enactments upon all possible subjects of legislative control, designed for temporary use until a more or less easily ascertained popular desire should call for a change.

Whether or not the more modern idea is the better is not the concern of this paper. Its statement is simply introductory to the general observation that amendments to and changes in constitutions are not sufficiently rare, even in Virginia, to justify any discussion of them merely on the ground that they are so unusual as to be interesting. As a general rule the interest in them, on the part of the public and the profession alike, is restricted to the policy involved in the substance of the alteration of the fundamental law. Occasionally, however, the method by which the amendment is sought to be adopted becomes peculiarly interesting to the lawyer, by reason of the technical questions that present themselves, arising from the construction and interpretation of the constitution itself as applied to the amending process.

The fact that the pending proposals of amendments to §§ 119

and 120 of the Constitution of Virginia were dealt with by the Legislature in a manner that presents several such interesting questions, which are wholly new in the courts of this state, is relied upon as sufficient excuse for the selection of the subject of this paper. The questions at least have the merit of timeliness; and their importance becomes obvious to the most casual investigator.

Virginia has had, during her one hundred and thirty-six years of sovereign statehood, six separate, complete constitutions. For a state that rather prides herself on her conservatism and the stability of her political institutions this might be considered, in the language of the day, "going some." However, the fact is explained, to some extent at least, by the entire absence from the first four of her constitutions of any provision for their amendment. It was probably considered as easy to secure a complete new constitution as it was to amend the old one in any particular.

Virginia's first constitution was completed June 29, 1776, by a convention which had not been called for that specific purpose. It had assembled for the purpose of considering, and making proper declaration of, her independence as a sovereign commonwealth. Mr. Jefferson, then in congress, expressed his opinion that the Convention was without authority to adopt a permanent constitution. The members, however, thought otherwise and assumed the duty as one necessarily incident to the work in hand, promulgating the constitution without reference to the people. Dodd's Revision of State Constitutions, p. 24.

This constitution was maintained without change until 1830, when a new one was framed by a convention chosen for the purpose, submitted to the people for approval and ratified by popular vote. No change in this constitution was made until 1851, when a convention called for the specific purpose framed a new one. It was likewise submitted to the people and ratified by them.

The next constitution of the state, if it can properly be so called, was that framed by the famous Alexandria Convention and promulgated by it on April 7, 1864.

Although, like its predecessors, the constitution of 1864 contained no provision for its amendment, yet it was amended in

the following manner: On June 21, 1865, the General Assembly passed an act directing the Governor to submit to the qualified voters of the state the question, "Shall the next General Assembly be clothed with power to alter or amend the third article of the Constitution?" The question was submitted to the people and was answered by an affirmative majority of ballots. Thereupon the next General Assembly proceeded to amend the first section of the said third article and very craftily resolved at the same time that:

"The General Assembly retains to itself the power to alter or amend all the other provisions of the said third article." Acts 1865-6, p. 197.

And later during the same session, further amendment of the Article was enacted, the changes relative to the elective franchise, Ibid, 226.

The next constitution to be adopted was that framed under the reconstruction Acts of Congress and which became effective January 26, 1870.

For the first time in the history of Virginia the constitution makers seemed to realize the need, long felt and provided for by other states, for a specifically defined method of effecting simple changes in the organic law. And they framed an article providing for amendments to the constitution which was practically the same that appears in our present constitution.

It is interesting to note that Mr. Jefferson's proposed draft for Virginia's constitution of 1776 contained the first known suggestion for constitutional amendment upon legislative initiation and subsequent ratification by popular vote. The proposal was not incorporated in that constitution; but Connecticut in 1818 adopted a constitutional provision embodying its general terms, that being the first constitution to provide for amendment by joint act of the legislature and the electors. Dodd's Rev. of St. Consts., pp. 124-5.

In general terms it is quite like that of Virginia's constitution today.

Under the amending clause of the Constitution of 1870 eight amendments were proposed and adopted. One other was initiated but failed of subsequent legislative approval.

The first amendment was proposed shortly after the constitution was adopted and was aimed at the clause in Article X which permitted a twelve percent contract rate of interest. This clause was stricken out by the amendment which was adopted in 1872.

In 1874 another amendment was adopted changing several sections of Article VII relating to county government.

In 1876 the third amendment was adopted changing § 1 of Article III relating to the elective franchise and qualification for office.

At the same time in 1876 another amendment was adopted making changes in numerous sections of Article V relating to state officers and legislative sessions.

In 1882 an amendment was adopted striking out the clause in § 1 of Article III which had been inserted by the amendment of 1876, requiring prepayment of poll tax as a prerequisite to the right to vote.

In 1894 the sixth amendment was adopted changing the tenth clause of the Bill of Rights so as to authorize the legislature to provide for trials of misdemeanors without jury.

The last two were adopted at the general election held in 1901. One provided for a change of Article X with reference to taxation of oyster fishers; the other affected Article VII relating to the time of holding county elections.

At the time of the adoption of these last two amendments the convention which framed our present constitution was engaged in its deliberations. And it is within the memory of the youngest members of the bar that this convention promulgated the result of its labors to become effective July 10th, 1902.

The amending section of the present constitution was preserved without a single inaterial alteration from that of the preceding constitution. It is embraced in § 196 and is as follows:

"Any amendment or amendments to the Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes taken thereon, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates, and shall be published for three months

previous to the time of such election. If, at such regular session the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the people, in such manner and at such times as it shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors, qualified to vote for members of the General Assembly, voting thereon, such amendment or amendments shall became part of the Constitution."

Under the existing constitution several amendments were proposed by the General Assembly of 1908. One related to § 46 and provided for an extension of the length of sessions of the General Assembly. One related to § 50 and dealt with legislative procedure. One proposed a change of § 110 so that treasurers and commissioners of the revenue of counties might succeed themselves in office. And one proposed a like change in §§ 119 and 120 with reference to those officers in the cities of the state.

These several proposed amendments, having been approved in four separate resolutions by the two houses of the General Assembly, were published as required by § 196 and presented to the General Assembly of 1910 for approval. They were all approved by that body, likewise in four separate resolutions, and by a bill approved March 9th, 1910, all of the amendments were submitted to the people to be voted on in the next general election.

The schedule of the submission act provided for a separate vote upon each of the four separate proposals for constitutional change.

In the election which followed all of the proposed amendments were rejected except that to § 110, relating to treasurers and commissioners of revenue of the counties, which was adopted by a narrow majority of a small vote cast upon the question.

The Governor made due proclamation of the result of the election as to the various amendments and the several matters were generally regarded as settled, for a time at least.

Immediately upon the convening of the General Assembly of 1912, however, there was introduced a bill, known as House Bill No. 29, which provided for the resubmission to the people of

the proposed changes in §§ 119 and 120 in such a manner that the voters might, if they so desired, vote differently as to the two officers affected. The theory upon which this bill was presented is expressed in its preamble, as follows:

"Whereas, it is apparent from an inspection of the ballot furnished to the voters in pursuance of said last mentioned act of the general assembly that the proposed amendments to sections one hundred and nineteen and one hundred and twenty of article eight of the Constitution of Virginia were coupled together on said ballot in such manner that a separate vote could not be had on each of said amendments, and that the will of the voters was therefore not ascertained on each of said amendments, separately; and

"Whereas, it is the sense of this general assembly that the people were entitled at the said election to a vote to be had and taken separately on each of said amendments to sections one hundred and nineteen and one hundred and twenty of article eight of the Constitution in order that their will might be accurately ascertained on each of said amendments and that said amendments to sections one hundred and nineteen and one hundred and twenty of article eight of the Constitution should be resubmitted to the people in order that the will of the people on each of said amendments may be accurately obtained thereon; therefore,

"1. Be it enacted by the general assembly of Virginia, That it shall be the duty of the officers conducting the election directed by law to be held on the Tuesday after the first Monday in November, nineteen hundred and twelve, at the places appointed for holding the same, to provide a separate ballot box at said election, in which the judges of election shall deposit the ballots of all qualified voters voting on the said proposed amendments to sections one hundred and nineteen and one hundred and twenty, article eight of the Constitution of Virginia, and open a poll and take the sense of the qualified voters upon the ratification or rejection of the said proposed amendments to sections one hundred and nineteen and one hundred and twenty, article eight of the Constitution of Virginia, *separately*, as contained in the joint resolutions proposing said amendments to the Constitution of Virginia, and directing a submission of said proposed amendments to the people for their approval and ratification."

Protest was promptly made before both the House and Senate Committees against the approval of the bill upon the ground that the original submission in 1910 was a valid and proper one; that

the proposed changes in the constitution could not again be submitted to the people except by proceedings absolutely *de novo;* and that any attempt to do so would be unconstitutional and void.

The protest was disregarded by both committees and by both Houses of the General Assembly and the bill was passed on February 14, 1912, and transmitted to the Governor for his signature. After securing the opinion of the Attorney General as to his right to have any part in the amending process, the Governor returned the bill to the House of Delegates without having signed it, stating that under the constitution as interpreted by the Attorney General he was without authority to either approve or disapprove the bill. It, therefore, became effective unless it be declared unconstitutional by the courts, proceedings for which purpose are now pending.

It is this action of the General Assembly which presents the unusual questions new to this jurisdiction and full of interest to the Virginia lawyer. Whether or not the resubmission act is constitutional, and leaving out of discussion for the present the rights and duties of the Governor in the premises, involves the consideration of three distinct, but correlated, questions which may be stated as follows:

1. Is the General Assembly of Virginia authorized to propose and submit to the people more than one amendment to the constitution at the same time and to be voted upon together?
2. Did the proposed changes in §§ 119 and 120, as proposed and submitted by the General Assemblies of 1908 and 1910, constitute more than one amendment?
3. In any event did the General Assembly of 1912 have authority to resubmit the proposed amendment or amendments without proceeding de novo under § 196?

1. Can More than One Amendment Be Submitted to Be Voted on Together.

It is contended by those who seek to sustain the resubmission act of 1912, that there is inherent in the people themselves a right to vote separately upon each proposed change in the constitution; that one General Assembly may propose as many changes as it sees fit, in a single resolution if it deems proper, and the succeeding General Assembly may approve them all in

like manner; but that immediately upon such approval the right of the electors becomes perfected to have the various changes submitted to them in such manner that they may vote for or against each one separately.

Those who attack the constitutionality of the act assert that the whole power of initiation, approval and submission of amendments is conferred upon the General Assembly by the provisions of § 196 of the constitution; and that the people have reserved to themselves no rights in the matter except that of voting upon such proposals as may be submitted and in the manner provided by the act of submission.

As one who has from the first contested the constitutionality of the act, as counsel for interested parties, it is natural that the present writer should regard this latter view as the one best sustained by reason and authority.

It is well settled law that:

"* * * the power of the Legislature of the State is supreme, except so far is it is restrained by the State or federal constitution." Moss *v.* Tazewell County (Va.), 72 S. E. 945.

Examining the language of § 196 of the constitution we find that, so far from attempting to restrain the legislature in the premises, it is specifically provided that the General Assembly shall submit "such proposed *amendment* or *amendments* to the people, *in such manner* and at such time as *it* shall prescribe." In this respect our constitution differs materially from those of twenty nine of the other states of the Union. *This difference is significant.* In all of these twenty-nine constitutions it is provided specifically that if more than one amendment be submitted at an election they shall be so submitted that they may be voted upon separately. Dodd's Revision of State Consts., p. 178.

This provision is said by the Supreme Court of Iowa to constitute "a *right reserved* by the people." Lobaugh *v.* Cook, 127 Iowa 181.

Many of these constitutions also contain other provisions relating to and controlling the several details of legislative procedure in proposing and submitting amendments. These constitutions were all in force at the time our present constitution

was under preparation by the convention, and it is to be assumed that their provisions were carefully considered and, for satisfactory reasons, rejected as undesirable for our own state. In other words, the failure to embody such restrictive provisions in our own constitution must be deemed to have been deliberate and intentional, and not merely a *casus omissum*. The right to vote separately upon two or more changes in the constitution *was not reserved to themselves by the people of Virginia.*

It would appear to follow, necessarily, that, in the absence of such specific restraints the General Assembly must exercise the discretion conferred upon it in the matter of submitting amendments; and that it may propose and submit as many amendments at one time as it sees fit, and, if it so desire, coupled together for a single vote thereon. Otherwise the legislature would not be supreme, within the limitations of specific constitutional restraint; and that is, of course, fundamental law.

This specific question has been decided by the Supreme Courts of Rhode Island and North Carolina, in constraining constitutional provisions in all material respects the same as those of Virginia. In both these States it has been held that the legislature may determine for itself whether the several proposed changes to the constitution should be submitted as a single amendment or separately. In re Opinion of Supreme Court (R. I.), 71 Atl. 798; Trustees *v.* McIver, 72 N. C. 76.

In the Rhode Island case the power of the legislature to submit the proposed amendments to a single vote, rather than separately, was treated as a matter of course concerning which there could be no doubt. The real question there was as to the *right* and *power* of the second legislature to submit *separately* amendments that had been *collectively* proposed. Strangely enough under the resubmission act of our General Assembly the question suggested is as to the *necessity* for the proposed amendments *to be separately submitted* even though they had been *collectively proposed and approved.*

There is much analogous judicial authority for the contention herein approved, although less directly in point, the two cases from Rhode Island and North Carolina being the only ones that have been found dealing with the specific question.

See Lovett *v.* Ferguson (S. D.), 71 N. W. 766; State *v.*

Timme, 54 Wis. 318; Lobaugh *v.* Cook, 127 Iowa 181; State *v.* Gray (Nev.), 19 L. R. A. 134.

If further authority were needed to sustain the view that has just been presented, it is to be found in the construction that has been placed upon the amending clause of our constitution by the legislature itself and acquiesced in by all departments of our state government and the people for a period of over thirty-five years. Within that time the General Assembly has more than once dealt with changes in the constitution in exactly the same way that the proposed changes to §§ 119 and 120 were dealt with by the Sessions of 1908 and 1910.

In 1873 several amendments were proposed to several different sections of the constitution relating to county organization in Virginia. The suggested changes affected numerous officers, and in different ways, and covered distinct features of county government. They were all embraced in a single resolution identical in verbiage with the proposing resolution of 1908 relating to §§ 119 and 120. Acts 1872-3, p. 274.

In 1874 the next General Assembly approved all the proposed changes in a single resolution, just as was done in the corresponding resolution of 1910. Acts 1874, p. 95.

At the same session the proposed changes were submitted to the people in just the same way that the General Assembly of 1910 proceeded; and the schedule required a single vote to be cast either for or against the "amendments;" as they were specifically pluralized. Acts 1874, p. 208.

An even more striking example of the legislative construction is contained in the history of the amendments adopted in November, 1876.

On March 20, 1875, a joint resolution was adopted, proposing an amendment to Article VI of the constitution relating to the elective franchise. Acts 1874-5, p. 200.

Ten days later another joint resolution was adopted proposing amendments to Article V, relating to the legislative department. Acts 1874-5, p. 399.

On February 22, 1876, the next General Assembly adopted a single joint resolution approving both the proposed amendments to the two articles; and on the same day it passed an act sub-

mitting both amendments to the people, coupled together, and providing that the voter should cast a single ballot for or against the *amendments*. Acts 1875-6, pp. 82 and 87.

Having in mind the necessary legal assumption that the convention which framed our present constitution was fully cognizant of this legislative construction placed upon the amending section of the old constitution, it follows that the adoption of that section without change for the new constitution carried that construction with it as the true and correct interpretation of its terms. And with so perfectly established a precedent so accurately followed it would seem that the acts of the General Assembly of 1908 and 1910 in dealing with the proposed changes in Sections 119 and 120 should be well protected from successful assault, at least in our courts if not in our legislature.

2. Did the Proposed Changes in §§ 119 and 120 Constitute More than One Amendment?

The second question that presents itself in this connection is whether or not the proposed changes in §§ 119 and 120 really embody more than a single amendment to the constitution. It is true that alterations in two separate sections are proposed and two different offices are to be affected thereby; but in view of the general policy involved, and the character of the offices, it would seem reasonable to regard the proposed changes as a single amendment. In other words the true object of the General Assembly was to change *both* sections or *neither*.

It has been repeatedly held, even in those states whose constitutions require the separate submission of each amendment, that the word clearly admits of a construction which would make it cover several propositions; and must be held to embrace all the changes of the constitution contained in the proposal which are pertinent to, and co-ordinate with, the single purpose sought to be accomplished. In order to constitute more than one amendment, the proposition submitted must relate to more than one subject and have at least two distinct and separate purposes not dependent upon or connected with each other.

Chicago *v.* Reeves (Ill.), 77 N. E. 242; Lobaugh *v.* Cook, 127 Iowa 181; State *v.* Timmie, 54 Wis. 318.

In the case of People *v.* Sours, 31 Col. 369, it is held that different *subjects* might be embraced and submitted in a single amendment, if they are so connected with or dependent upon the general subject that it might not be desirable that one be adopted and not the other.

This view of the Colorado Court commends itself as reasonable and sound. The General Assembly is the sole agency in the state of Virginia which can initiate amendments to the constitution. If it be the purpose of that agency to propose a change of the policy of the constitution with reference to the right of certain officers to succeed themselves in office, it is none the less one purpose and one amendment because the officers to be affected are dealt with in several sections of the constitution. Suppose the proposed amendment had been the simple declaration that no official of the State should succeed himself in office, could it be reasonably contended that such a proposal embraced as many amendments as there are officers provided for in the constitution? The suggestion is a perfect example of the *argumentum ad absurdum.*

The legislative history of the proposed amendments to §§ 119 and 120 demonstrates the clear purpose of the General Assembly to treat the proposal as a single amendment.

Treasurers and Commissioners of the Revenue in counties are dealt with in a single section of the constitution (§ 110), which provides that they shall not after a given service succeed themselves in office. An amendment to that section providing that *both* officers might succeed themselves was proposed in a single resolution, approved in a single resolution and submitted to a single vote. No question has been suggested in any quarter as to the propriety and legality of that proposal or of its final adoption into the constitution. Five different resolutions were introduced at the same session of the General Assembly which dealt with the county officers, proposing the same identical change as to the same officers in cities. Two of them were introduced in the House of Delegates, one to amend § 119 with reference to Commissioners of the Revenue and one to amend § 120 relating to Treasurers. In the Senate three were presented, one to amend § 119 and one to amend § 120 (identical

with the House resolutions) and one proposed the amendment of both sections (§§ 119 and 120) in the same resolution. The resolutions dealing with the two sections separately were not adopted; but the one dealing with them together as one proposition was adopted. And throughout the entire course of initiation, approval and submission the changes in the two sections were kept tied together, even though several other distinct amendments were submitted to the people in the same act of reference.

It would be difficult indeed to imagine a more clearly expressed legislative purpose to regard the proposed changes as a single amendment. And upon reason, as well as upon the authorities above referred to, it is the true legislative intent that must control the determination of this question in Virginia. It would seem to follow that the supporters of the resubmission act are in error in asserting that the proposed changes in §§ 119 and 120 as submitted to the people in 1910, constitute two amendments. And their whole case is built upon this assumption.

3. In Any Event Did the General Assembly of 1912 Have Authority to Resubmit the Rejected Amendments?

Assuming that the proposed changes in §§ 119 and 120 comprised two separate amendments; and assuming further that they should have been submitted to the people separately by the General Assembly of 1910, there still remains the question of the authority of the General Assembly of 1912 to deal with the matter other than *de novo* under § 196 of the constitution.

It is contended by those who seek to sustain the present status of the pending proposals that, when an amendment has been duly proposed and approved as provided in § 196, it is then the *privilege* of the approving General Assembly, though not its specific duty, to submit the amendment to the people. And if that General Assembly should fail or refuse to submit the amendment, or should improperly submit it, any subsequent General Assembly might do so.

From a careful reading of § 196 it would seem that this contention is contrary to the spirit and intent, if not the strict letter, of the constitutional provision. It is obviously the purpose of that section to provide that one General Assembly shall pro-

pose an amendment; that, after the people shall have had an opportunity to consider it during its period of publication, the next General Assembly, fresh from those people and knowing their will, shall either approve or disapprove it; and that upon approval thereof the submission act shall be forthwith adopted. Not only is this the interpretation that has been sanctioned by the constant and unvarying practice of the General Assembly in dealing with amendments, but it is the only interpretation of the section that provides for a definite conclusion of the amending process. If it be not correct the anomoly might well present itself of a legislature approving an amendment in accord with the will of the people yet refusing for years to submit it to their final ratification.

A diligent search has disclosed but little judicial authority upon this point. It is true that in an Indiana case it was *suggested* that an amendment, the status of which was being questioned, *might* be again submitted to the people. But in that case the specific point was not before the court; and the peculiar condition was presented that the amendment, though properly submitted to the people, was neither ratified nor rejected by them, the vote being insufficient for either purpose. It was the people who had failed to act in the matter. State *v.* Swift, 69 Ind. 505.

On the other hand, in a recent case decided in Oregon, the point was directly involved and the court held that upon failure of the approving legislature to submit the proposed amendment to the people, the whole proposal lapsed and could not be thereafter submitted by a subsequent legislature. Kadderly *v.* Portland (Ore.), 74 Pac. 710.

The only material difference between the Oregon and the Virginia Constitutions upon this point is in the requirement of the Oregon Constitution that it shall be the duty of the legislative assembly when it submits the proposed amendments to "cause the same to be published without delay." This language was referred to by the court as an additional reason for the construction which it placed upon the entire section, but the whole reasoning of the elaborate opinion is directly applicable to our own constitutional provision even without the phrase quoted above. It is consonant with the good sense of the situation, as

well as the fair meaning of the language employed in both instruments.

There would seem to be no good reason to attempt any distinction between a total failure to submit and an improper submission if the view above expressed is correct. In either case the General Assembly having exhausted its power becomes *functus officio*. The proposed amendment is dead and cannot be revived. A new one must be initiated. Indeed it may be said that in the Virginia Constitutional Amendment Calendar there is a Christmas and an Epiphany Season; there may even be a Good Friday; but there is no Easter.

It will readily appear from the foregoing that if I am right in my contention as to anyone of these three questions involved, then the resubmission Act of 1912 is clearly unconstitutional and void.

If I have been less successful in convincing all of my hearers of the soundness of the views herein so briefly expressed than I have been in satisfying myself with their correctness, that is a result which might well have been anticipated. In the very nature of things it is impossible for so many lawyers to agree upon any given question however plain it might seem. And it is only fair and proper to say that learned and upright counsel have maintained opposite views to those herein advocated with an ability and dignity that could not be excelled.

In my contemplation of the scope and general character of this paper I had hoped and fully intended to briefly present the questions herein dealt with in a purely academic way and without argumentative suggestion. In its preparation, however, I found myself unable to resist the natural temptation to briefly present my own views with a few of the reasons upon which I relied to sustain them. In doing so I may have detracted, to some extent at least, from both the interest and value of the paper. It is hoped, however, that even this cursory treatment of the subject, and more or less one-sided as it is, may prove of some interest to the profession and enable its members with somewhat greater ease and readiness to follow the course of the litigation now pending, involving the questions herein considered; and to more readily comprehend the scope of that which may hereafter follow.

FRED HARPER.